CENTRAL DELTA WATER AGENCY
235 East Weber Avenue • P. O. Box 1461 • Stockton, CA 95201
Phone 209/465-5883

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Via Fax (916) 653-9981
and UPS Overnight Delivery

CALFED Bay-Delta Program
1416 Ninth Street, Suite 1155
Sacramento, California 95814

Attention: Rick Breitenbach

Re: Draft Programmatic Environmental Impact Statement/
Environmental Impact Report

Dear Sir:

Thank you for the opportunity to comment on the Draft Programmatic EIS/EIR.

STRUCTURE OF CAL/FED - Compromise of Regulatory Integrity

The inclusion of the regulatory agencies with the operators of the State and Federal export projects in the planning of projects for which the regulators must issue permits, substantially destroys the already compromised integrity of the state and federal regulatory processes. Even without CALFED, the fact that the State and Federal governments are the operators of the SWP and CVP results in a substantial tilt of the scales of justice in favor of exporting northern California water to the Central Valley and to southern California. The power and influence of the State and Federal governments including the California Attorney General and the U.S. Department of Justice is generally aligned with the export contractor interests. The water contractors are the customers of the projects and are thereby joined with the project operators both contractually and financially. The department of Fish and Game, State Water Resources Control Board, Fish and Wildlife Service, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, and National Marine Fisheries service all have regulatory processes which require the independent exercise of discretion. Protection of the public trust and/or the interests of other affected parties requires that the regulators remain at arms length with the regulated parties.



C-012178

The proactive roll of the Secretary of Interior and the Governor of the State of California aggravates the already difficult task of independent exercise of regulatory discretion.

**EXCESSIVE DEMANDS ON THE SACRAMENTO AND SAN JOAQUIN RIVER WATERSHEDS**

The range of alternative actions considered is focused on the Sacramento and San Joaquin River Watersheds. These watersheds have yielded more water for export than originally planned and are reflecting the stress of such exports.

Implicit in the assumptions which form the basis of the EIR/EIS is the premise that there are adequate water supplies in the Sacramento-San Joaquin watershed to serve the beneficial uses of water in the watershed areas, to restore the ecosystem of the Bay-Delta Estuary and its tributaries, and to maintain and expand deliveries of water to the export contractors. This is, at best, a misleading premise.

When the yield calculations were being performed for the Central Valley Project and the State Water Project, it was assumed that the maintenance of the 1000 parts per million chloride-ion line at the western edge of the Delta would be adequate to serve the beneficial uses of water upstream, to maintain ecological resources at acceptable levels, and to protect the water quality at the export pumps for intended purposes. It was then estimated that net Delta outflow in the range of 3000 cubic feet per second would be adequate to achieve all of those results.

Furthermore, in the planning of the State Water Project, it was assumed that many additional on-stream reservoirs would be added to the Oroville and San Luis Reservoirs as the demands of the State Water Project customers increased their demands toward the contracted entitlements and as upstream depletions increased.

We pause here to refer to Bulletin No. 76 "Delta Water Facilities," Preliminary Edition, published by the Department of Water Resources in December, 1960, which describes the intended development of the State Water Resources Development System at the time the Burns Porter Act authorizing the bonds for the State Water Project was passed by the voters of the state. See the chart and text which appear at Page 11 of that Bulletin which is attached.

In the intervening forty years, we have learned that net Delta outflows necessary to protect ecological resources are often several magnitudes greater than 3000 cubic feet per second, thereby cutting deeply into calculated exportable surplus flows. We also know that none of the additional storage facilities have

been added to the State Water Project and that storage increases to the Central Valley Project have been essentially negated by yield commitments made for environmental restoration dictated by the CVPIA, the Endangered Species Act and other environmental restoration obligations.

In other words, in the face of lack of storage additions to the State Water Project and diminution of exportable surplus water resulting from upstream depletions and environmental restoration obligations, the premise of the EIR/EIS that exportable water from the Bay-Delta system will remain at current levels, or increase, is not reasonable.

**THE NEED FOR A FOURTH ALTERNATIVE**

The three alternatives, together with their variations, presented and discussed in the programmatic environmental review documents have a common flaw--none of them can reasonably be expected to satisfy CAL FED's stated Solution Principles. Because of the over commitment of the water resources of the Bay-Delta (discussed above), all of the alternatives depend upon massive new storage capability to be able to sustain, much less increase, exports from the Delta. The history of water development in California (and elsewhere) since 1960 indicates that massive storage additions to the system are not likely, and most certainly cannot be anticipated to occur in time to meet growing population demands as they are projected to occur.

Without major storage additions, none of the studies alternatives can be expected to reduce conflicts in the system, be equitable, be implementable, be durable, or have no significant redirected impacts. And without long-range prospects for solving California's growing water needs, the populace is not likely to consider these expensive alternatives are affordable either.

Under traditional water rights, the most junior rights are diminished or extinguished when water supplies prove insuffi cient. Generally speaking, the State Water Project is the junior user of the Bay-Delta supply, particularly when the larger part of its supply comes from unregulated flow to the Delta rather than from its re-regulated storage supplies otherwise available for export.

CAL FED must develop at least one alternative that goes beyond redividing existing shortages in the Delta and that will meet its Solution Principles and not destroy existing water rights priorities. It should be looking for a practical, farsighted means of supplying the growing needs of the export customers of the State Water Project without reallocating shortages and reordering water rights priorities as the growing needs

of ecological restoration and the "areas of origin" reclaim more and more of the Bay-Delta system's water supplies.

The many uncertainties associated with correcting environmental damage and restoring an increasing list of endangered species will demand countless years of adaptive management and experimentation. Northern California Water supplies will be increasingly needed to repair environmental damage and to meet the growing needs of Northern California.

The planning upon which the State's Water Resources Development System was based included sequential construction of on-stream storage facilities on north coast rivers thereby capturing surplus waters to increase the water supply available in a "common pool" in the Delta for both in-basin and export uses. Such planning is no longer viewed as an acceptable approach and the current effort is directed at increasing extractions from the already highly developed watersheds tributary to the Delta. The heavy emphasis on water transfers and relocating intakes farther up the rivers looks like a regression to the "Owens Valley" type of water reallocation simply cloaked by a "smoke screen" of modern day concerns. A plan which results in destruction of one part of our State to serve the needs of another part is short sighted and clearly not in the public interest.

New policies should be implemented which would provide that the area enjoying the benefit of development should bear the burdens. Redirected impacts should not be allowed.

Each region of the State and perhaps each county which is dependent upon imported water should be required to develop a plan to achieve water self sufficiency with a diminishing supply of imported water. New development which is dependent upon imported water should be prohibited. Such self sufficiency plans should incorporate 1) water conservation; 2) water reclamation including desalting brackish and if necessary sea water; 3) higher levels of treatment of sewage effluent to allow for safe use of effluent for irrigation of golf courses and landscaping, industrial use, and in suitable cases human consumption; 4) installation of dual water systems particularly in new developments; 5) improvements to water treatment facilities so that water from less desirable sources can be beneficially used; and 6) reconstruction of flood control facilities such as concrete-lined channels to facilitate recharge of groundwater and other water conservation efforts. Change of use of wastewater to avoid increased levels of treatment should not be allowed. Grants for upgrading wastewater treatment facilities throughout the state should be directed towards achieving a level of treatment sufficient for recycling the wastewater within the community generating the wastewater. Coastal communities should not be allowed to

provide minimal treatment for a discharge to the ocean or bays while at the same time importing water supplies from other areas.

The existing State Water Project facilities and Central Valley Project facilities could continue to provide an interim supply of truly surplus waters to importing areas as supplies are developed. In times of emergency, all areas would be expected to extend a helping hand to any area in need.

The logical additional alternative would look to means to "wean" Southern California and other coastal importers off the Bay-Delta supply by developing "new" supplies of water within their own hydrological basins. The South Coastal Basin which claims entitlements to over two million acre-feet annually from the State Water Project of course presents the greatest opportunity.

Such an alternative would take water conservation, urban planning, reuse and recycling, in-basin water transfers, and desalinization to the next levels, and make such areas less dependent on and possibly independent of the Bay-Delta water in a time frame consistent with that area's needs, as well as the needs to restore the ecological resources of the Bay-Delta system and to serve the growing needs of Northern California.

Three major advantages are foreseeable from such an alternative:

1. Less water would be pumped from the Delta, alleviating damage caused by export pumping;

2. Less water would be lifted over the Tehachapi Mountains, thereby freeing up enormous sources of electrical power and money to be applied to new conservation, recycling and desalinization efforts in Southern California; and,

3. Technologies would be encouraged, developed, refined and implemented which would provide long term reliable water supplies, especially for our growing coastal urban communities while allowing stable agricultural based economies and ecological health to be restored and sustained by our river systems.

**ALTERNATIVE 3 AND THE VARIATIONS THEREOF VIOLATE THE ASSURANCES AND GUARANTEES WHICH WERE THE CORNERSTONE OF BOTH THE FEDERAL CENTRAL VALLEY PROJECT AND STATE WATER PROJECT**

The peripheral canal described in Alternate 3 is the peripheral canal as rejected by the voters in 1982 without any outlets for or releases to maintain water quality in the Delta. The capacity is proposed to be reduced from the 1982 version primarily due to the elimination of releases to maintain Delta water

quality. As displayed in the attached model runs distributed by CAL/FED the Total Dissolved Solids (TDS) which are basically salts will be increase by 25% at Terminous, 40% at Prisoners Point and 60% in Middle River. The Phase II Interim Report Technical Appendix at page 115 reflects that Alternative 3 would "reduce water quality (increase salinity) by up to 80% in the eastern Delta". The so-called "eastern Delta" includes the majority of the area within the Central Delta Water Agency. These areas are the areas always intended to be a part of the "common pool". The western Delta was an area which if not protected by the "common pool" was to be served by an overland water delivery system (substitute water supply). The peripheral canal described in Alternate 3 does not include overland water distribution systems to supply either the western or interior of the Delta and does not provide for releases of water to maintain Delta water quality. The peripheral canal would export water directly from the Sacramento River rather than from the "common pool" from which the Delta users would draw their water.

**Water Code section 11460** which was enacted by the Statutes of 1943 provides:

**§ 11460. Prior right to watershed water**

"In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

**Water Code section 12200** provides in part that "water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water deficient areas." The importance of having a common source or common pool from which both the exporters and Delta users divert is that both groups will share a common interest in maintenance of adequate water quality including salinity control.

**Water Code section 12201** finds that "the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development in the Delta area . . . and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, safety and welfare of the people of the State, . . . ."

**Water Code section 12202** requires that the SWP and CVP provide salinity control and an adequate water supply for the users of water in the Delta. The section also provides: "If it is determined to be in the public interest to provide a substitute water supply in the Delta in lieu of that which would be provided as a result of salinity control, no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution." The substitute water supply was contemplated as a possibility for the western Delta not as a replacement or substitute for the "common pool". In any event, the CAL/FED peripheral canal does not provide for substitute supplies.

**Water Code section 12203** declares the policy of the State to be: "No person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled."

**Water Code section 12204** makes it clear that "no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter."

**Water Code section 12205** provides:

**§ 12205. Storage of water; integration of operation and management of release of water**

"It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part."

**Department of Water Resources Bulletin No. 76, Preliminary Edition December 1960 Report to the California Legislature** at page 11 provides:

> "The coordinated use of surplus water in and tributary to the Delta and of regulated or imported supplements to this supply, as required, is referred to as the Delta Pooling Concept. Under this concept of operation the State will ensure a continued supply of water adequate in quantity and quality to meet the needs of export water users. Advantage will be taken of surplus water available in the Delta, and as the demand for water increases and the available surplus supply is reduced by further upstream uses, the State will assume the responsibility of guaranteeing a firm supply of water, which will be accomplished by construction of additional storage facilities and import

works. At the same time, the water needs of the Delta will be fully met."

At page 12, it is stated:

"Further increase in water use in areas tributary to the Delta will worsen the salinity incursion problem and complicate the already complex water rights situation. To maintain and expand the economy of the Delta, it will be necessary to provide an adequate supply of good quality water and protect the lands from the effects of salinity incursion. In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate sup plies for the Delta are first provided."

At page 26:

"The California Water code specifies that one of the functions of the State Water Resources Development System is to provide salinity control and an adequate water supply in the Delta. If it is in the public interest to provide substitute supplies in lieu of salinity control, no added financial burden shall be placed on the local water users as a result of such substitution. the code also declares that water to which the Delta is entitled shall not be diverted. It is clearly established that supplying water for the Delta must be a primary and integral function of the State Water Facilities."

1) The peripheral canal in CAL/FED Alternate 3 does not "make supplying water to the Delta a primary and integral function of the State Water Facilities." It does not even have mechanisms for releases of water to the Delta. The primary purpose is to improve water quality for exports and increase the quantity that can be exported. The result is degradation of water quality in much of the Delta.

2) The peripheral canal in CAL/FED Alternate 3 does not integrate the releases from storage for export to the maximum extent possible in order to permit fulfillment of the objectives of Water Code section 12200 et seq. to wit: maintenance of the "common pool", "Delta salinity control", "adequate supply in the Delta" and "limiting exports to surplus water".

3) In the south Delta releases from storage are being used to meet fishery flow requirements at Vernalis in April, May and October rather than using water from exports via releases from the Delta Mendota Canal and/or San Luis Reservoir. Such releases

from storage reduce the water available to supply the needs within the "watersheds of origin" such as those within eastern San Joaquin County and those along the lower San Joaquin River portions of the Delta. Export pumping of portions of such releases is allowed even though the water contracts of eastern San Joaquin County Districts and the Vernalis salinity standard are not being met. The priority is wrongfully given to export water users rather than water users within the Delta and other "areas of origin".

**OPPOSITION TO PERIPHERAL CANAL (ALTERNATIVE 3)**

The agency is unalterably opposed to the Peripheral Canal or any other isolated Delta Transfer facility. Alternative 3 is simply the Peripheral Canal without outlets for releases to the Delta channels. With the canal, water from the Sacramento River can be bypassed directly to the export pumps without going through the Delta channels. State and Federal export project operators and their contractors will only be concerned for the water quality at the intake to the peripheral canal and not for the water quality in the Delta pool. The experience with the past operations of the export projects conclusively demonstrates that unless there is a common interest in protecting the quality of water in the Delta pool water quality will deteriorate and the Delta will be destroyed. If the exporters and Delta interests share water from the common pool what is good for one will be good for all, what is bad for one will be bad for all. The Delta Protection Act (Water Code Section 12200 et seq.) confirmed the promise that the projects would provide salinity control and an adequate water supply for the Delta, that the Delta would be maintained as a common pool for both in Delta and export use and that only surplus water would be exported. The United States, the State of California and their contractors should live up to their promises. Other problems with the canal proposal include: seepage which will damage adjacent agricultural and urban areas, the loss of substantial acreage for rights of way, and obstruction of the passage of in-channal and overland flood flows. Alternatives 1 and 2 which do not include any isolated canals can provide the basis for acceptable solutions.

**CONVERSION OF FARMLAND**

The agency is opposed to the portions of the ecosystem restoration program which would convert large acreages of viable agricultural land to tidal wetlands or other uses incompatible with agricultural production. There are ample areas already inundated which can be improved to provide additional habitat. Areas such as Frank's Tract, Little Frank's Tract, Mildred Island, Little Mandeville, Rhode Island and a large number of channel islands can be improved for habitat purposes without any significant impact on agriculture. Conversion of agricultural

lands to tidal wetlands will greatly increase the amount of water lost to evaporation and evapo-transpiration. For the Delta the additional loss will be about two (2) acre feet per acre. Conversion of 150,000 acres would require an additional 300,000 acre feet of water. Programs which encourage "wildlife friendly" agricultural practices are already being implemented and could be expanded.

**LIMITATIONS ON EXPORT PUMPING**

The CALFED program fails to recognize the promises and legal requirements that exports are to be limited to water which is truly surplus to the needs of the Delta and other areas of origin. The original concept that a number of dams would be built on north coast watersheds to provide a progressively increasing water supply to meet the needs in the areas of origin and export areas has been junked. The focus now is to take more and more water out of the already highly developed Sacramento/San Joaquin Delta watersheds primarily by way of greater diversion of unregulated flow and transfers. The plan should provide that exports be limited to surplus waters. Export pumping should not be increased unless it is demonstrated that the needs (including the environmental needs) in the Delta and other areas of origin are fully met. The Draft does not provide a range of alternatives to reflect reduced export pumping from the Delta as a solution to the fishery, water level, sedimentation and scour impacts. The San Joaquin River fish flow requirements appear to be a clear example of the release of large quantities of water to mitigate for damages caused by export pumping. A better alternative might be to reduce or eliminate pumping, use the water to meet the needs in the areas of origin and develop substantial substitute supplies for the export areas.

**WATER TRANSFERS**

The plan's dependence on water transfers rather than development of new yield will result in the transfer of impacts from export areas to the areas of origin. In the Sacramento/San Joaquin Delta Watershed most surface and groundwater sources are interconnected and the transfer of water from one source will eventually impact the other. In most cases conservation measures in upstream areas reduce the recharge to groundwater and/or reduce the surface supply for downstream and in stream uses. Only when there is a true reduction in consumptive use will there be additional water. Reduction in consumptive use for agriculture generally results in reduced production or requires land fallowing. Both have significant adverse economic impacts to areas from which the water is transferred.

WATER QUALITY

The water quality program seeks to improve water quality for exporters but degrades water quality in much of the Delta. Export water quality should not be improved at the expense of water quality in the Delta and other areas of origin.

The urban exporters have been instrumental in withdrawing greater quantities of unregulated fresh water flows through the Delta and reducing the salinity control in the Western Delta to such an extent that they are now complaining about the very salinity (bromide) intrusion which they have caused. The plan to increase the regulation of point and non-point discharges in the areas of origin is simply another way to make the areas of origin bear the burden of the export of greater quantities of fresh water. Correcting the problems of the San Joaquin River, reducing exports at times when water quality is undesirable, improving water treatment processes, providing more salinity control, and improving water supply independence in the importing areas can be combined with some Alternative 1 or 2 channel improvements to address the concern.

SAN JOAQUIN RIVER RESTORATION

The plans do not address restoration of the damage to the San Joaquin River caused by the United States by way of the construction and operation of Friant Dam and the delivery of water to the westside of the San Joaquin Valley without a drain to take the salts to the ocean. Restoration of the San Joaquin River could significantly improve water quality in the south Delta for both in-Delta and export use. Water transfers from the export contractors and Friant water users could provide water for the San Joaquin River upstream of the Merced, thereby re-establishing the habitat for fish while at the same time addressing the salinity problem in the San Joaquin River.

THE DRAFT FAILS TO RECOGNIZE THE NEEDS WITHIN THE AREAS OF ORIGIN AND THE LEGAL PRIORITY GIVEN TO MEETING SUCH NEEDS

The Draft should address Water code section 11460 and its applicability to the various plans. The concept of "getting better together" appears to circumvent the priorities and promises that the needs in the Delta and other areas of origin will be met first and that only surplus water will be exported. Such concept also appears to ignore the export project responsibilities to mitigate their damages and provide salinity control.

LACK OF ASSURANCES

The Draft does not separate the export projects responsibilities to mitigate damages from the actions in the common ele-

ments. Water Code section 11912 requires the Department to include as a reimbursable cost to be paid by the SWP Contractors an amount sufficient to "repay all costs incurred by the department directly or indirectly or by contract with other agencies, for the preservation of fish and wildlife and determined to be allocable to the costs of the project works constructed for the development of water and power, or either."

The Draft should address how the legal provisions of Water Code sections 11900 et seq., 11460 et seq., 12200 et seq., 10505 et seq. and 12300 et seq. are to be met.

Control of the Delta export pumping facilities, Delta cross-channel, and any other Delta facilities should be taken away from DWR and the USBR and placed in the hands of a new entity governed by representatives of entities with interests most likely to be adversely affected and most likely to be ignored. One representative from each of the following entities: the Central Delta Water Agency, South Delta Water Agency, North Delta Water Agency, Contra Costa County, Suisun Marsh Conservation District, National Marine Fishery Service, United States Fish and Wildlife Service and Department of Fish and Game, and one representative appointed collectively by the major environmental organizations active on Delta issues should comprise the governing board. The new entity would be required to operate the facilities to comply with all regulatory mandates and will be funded by fees and charges levied against each acre foot of water exported. The structure and operating regulations of the new entity will be validated by way of a stipulated judgment in a Sacramento Superior Court proceeding in which the USBR and DWR have submitted to the continuing jurisdiction of the court. Said stipulated judgment will include provisions which clearly provide that in times of lack of surplus water or inability to meet any regulatory restraint, the exports will be reduced to zero.

Any other additional mechanisms for assuring that past wrongdoing will not be repeated should also be addressed in the Draft.

Yours very truly,

DANTE JOHN NOMELLINI
Manager and Co-Counsel

DJN:ju
Enclosure



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